metris
COMPANIES

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May 5, 2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Metris Companies Inc. Comment on the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Docket Number: CG 02-278

Ladies and Gentlemen:

Metris Companies Inc. ("Metris") appreciates the opportunity to comment on the Federal Communications Commission's ("FCC" or "the Commission") Notice of Proposed Rulemaking on additional rules to carry out congressional directives in the Telephone Consumer Protection Act of 1991 ("TCPA") and the Do Not Call Implementation Act[1]. Metris has a significant interest in how our customers and our operations would be affected by the contemplated Rule.

I. INTRODUCTION

Metris is one of the nation's leading providers of financial products and services. The company issues credit cards through its wholly owned subsidiary, Direct Merchants Credit Card Bank, N.A., the 11th largest bankcard issuer in the United States. Through its enhancement services division, Metris also offers consumers a comprehensive array of value-added products, such as credit protection, extended service plans, and membership clubs. The company is publicly traded on the New York Stock Exchange (NYSE:MXT).

Metris believes that only a national do-not-call registry that sets a uniform national standard appropriately balances the interests of consumers in protecting themselves from

[1] Pub. L. No. 108-10, 117 Stat. 557 (2003).

unwanted calls with the interests of business in being protected from unreasonably duplicative and burdensome regulation. We further believe that adopting the FTC's basic framework, combined with clearly articulating the FCC's intention to set one uniform national list, is the right approach to the requirement set forth in the Do-Not-Call Implementation Act: that you "maximize consistency" with the FTC. Finally, we believe that the FCC is the proper entity to set a uniform national standard, and we respectfully request the Commission to do so.

II. DISCUSSION

A. OPERATIONAL BASIS FOR A UNIFORM NATIONAL STANDARD

Consumers who do not wish to be contacted for marketing purposes by telephone should have the option to opt-out of receiving future solicitations. Businesses like Metris have no interest in calling an individual who does not want to be contacted. However, multiple lists that purport to serve the identical function but clearly put a tremendous strain on legitimate business, serve neither consumers nor businesses.

Thirty states have enacted do-not-call laws to date, with more expected in the near future. In every instance, the registries have distinct rules, fees and penalties. Without setting a uniform national standard, a national do-not-call rule would be "national" in name only. It would impose yet another registry and further complicate the process of determining which consumers have opted-out of telemarketing.

In addition to maintaining our own do-not-call databases under the current regulations, we are required to examine multiple state databases with different information and inconsistent formats to determine whether we can call an individual. We currently maintain a do-not-call registry for those customers who do not want to be contacted by phone pursuant to the privacy provisions of GLB and other laws. We are also a member of the Direct Marketers Association ("DMA") and participate in the DMA do-not-call registry.

Thus, before we initiate a call, we must 1) check that the customer is not on our do-not-call list; 2) verify that the person is not on the DMA list; 3) and make sure that we are complying with the applicable state list by verifying that the consumer is not on that list. Only then can the call be made. Incredibly, the FTC's list, without preemptive action by the FCC, will add yet another layer to this already arduous process. Under the FTC rule, telemarketers would still be subject to potentially 51 different state and federal do-not-call lists. A single centralized list would ease this burden significantly.

The FTC lacked either the power or the will to issue a rule that would create a uniform national standard. The FCC has that power and, we strongly believe, should exercise it. Certainly Metris would like the Commission to clearly affirm its broad preemptive authority in matters regarding telemarketing activities. However, it is our strong belief that, for the following reasons, even without such an affirmation, a list established by the FCC would automatically preempt inconsistent state law.

B. LEGAL BASIS FOR A UNIFORM NATIONAL STANDARD

In addition to the many benefits that a single preemptive national do-not-call list will bring to consumers and industry alike, legal principles instruct the Commission that by establishing a national do-not-call list, the list becomes preemptive of state laws — at least as to interstate calls. In the Telephone Consumer Protection Act, Congress gave the Commission clear authority to:

> "require the establishment and operation of a *single national database* to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."[2] (Emphasis added.)

So even while Congress authorized the funds for the FTC to create its national do-not-call list earlier this year, the TCPA still envisions that if the FCC creates a do-not-call list it will be *the "single national database"* that would be exclusive of both the states' and FTC's lists. Nothing in the Do-Not-Call Implementation Act (PL 108-10) amends the national do-not-call registry contemplated by the TCPA.

Further evidence that Congress intended the list contemplated by the TCPA to be a single national uniform registry is the language in the TCPA that explicitly sets forth 12 requirements that this national database must meet.[3] The House Committee Report states that Congress provided this detail, "because state laws will be preempted."[4]

One need not look to legislative history, however, for evidence of Congress' intent for any FCC do-not-call list to be preemptive of state lists. The TCPA states,

> IIf, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state."[5]

In other words, once the Commission's national database is established, a state must either conform its do-not-call framework to the federal rule or dismantle its registry.

States attorneys general and others have voiced opposition to the national registry's preemption of state law. Their argument that consumers would be better served by numerous lists ignores the very purpose of a singular comprehensive national list. Their policy argument fails to recognize the objectives of simplifying the registration process for consumers and blocking — if desired — almost all telephone solicitations. Similarly, their legal argument against preemption fails to recognize the operation of the TCPA and regulations issued

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[2] 47 U.S.C. § 227(c)(3).
[3] Id. at § 227(c)(3)(A)-(L).
[4] H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 21 (1991).
[5] 47 U.S.C. § 227(e)(2).

thereunder in relation to state laws. While it is true that the TCPA does include a savings clause in Section 227(e)(1), that subsection categorically excepts a single national do-not-call registry from the savings clause as outlined in Section 227(e)(2) quoted above. Simply stated, the savings clause in the TCPA does not foreclose a preemptive national list; instead, it foresees preemption of state lists once the Commission creates a registry.

Because the FCC's jurisdiction is concurrent with the states regarding intrastate calls, the TCPA is not as clear with regard to states' ability to create, administer, and enforce do-not-call lists for these calls. However, general application of federal communications law should still preempt state lists. Through its detailed enumeration of the 12 requirements that any Commission do-not-call registry must include, Congress clearly struck a balance between the privacy interests of consumers and the right to legitimate commercial speech. To the extent that any state regulation of intrastate telemarketing calls differs from the 12 requirements of the TCPA and the regulations issued pursuant thereto, that state regulation would upset the balance and, consequently, undermine the purpose of the TCPA. Such laws should be preempted.

The Supreme Court in the case of *Geier v. American Honda Motor Co., Inc.,*[6] ruled that where a preemption provision and savings clause both exist in a federal law, the savings clause does not necessarily bar preemption based upon broader preemption principles. The Court held that it declines "to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." The Court further held that where state laws stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, those state laws are preempted regardless of specific savings clauses in the federal statute.

The continued operation of separate state do-not-call laws that differ from the single national FCC registry would, like the laws preempted in *Geier*, clearly upset the purposes and objectives of Congress evidenced by its clear outline for a do-not-call registry in the TCPA. The states attorneys general already assert that their enforcement of state do-not-call laws extends to interstate calls received in their respective states under long arm jurisdiction. Such enforcement actions based upon state laws over interstate telemarketing activity will undoubtedly disrupt the regulatory scheme envisioned by the TCPA and the Commission's do-not-call rule, confuse consumers and create near impossible compliance burdens for industry. Accordingly, under the *Geier* standard, state do-not-call laws — even if they ostensibly pertain only to intrastate calls — should be preempted by the Commission's forthcoming rule as permitted by the *Geier* decision.

While we urge a clear affirmative statement of the Commission's broad preemptive authority in its forthcoming rule, it is our position that such a statement is not required. The TCPA already provides this preemptive language for any national rule that the FCC would issue pursuant to Section 227(c)(3) of the TCPA. Furthermore, even state laws seeking to regulate intrastate calls could be preempted under the *Geier* standards if they were to differ from the Commission's rule enough to disrupt the regulatory scheme envisioned by the FCC. In order to preserve this preemptive authority, the FCC merely need not cede it in their current rulemaking.

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[6] 529 U.S. 861, 867-68 (2000).

IV. CONCLUSION

Setting one uniform standard is the only way to create a truly national do-not-call list. One uniform do-not-call list will best balance the legitimate consumer desire to be free from unwanted calls with the legitimate business interest in being protected from unreasonably duplicative and burdensome regulation. The FCC has the clear authority to create a uniform list, and we respectfully request the Commission to exercise this authority.

We appreciate the opportunity to comment and look forward to working with Commission. Please contact Metris Director of Government Affairs and Legislative Counsel Danielle Fagre at 952-417-5705 with any questions regarding this comment.

Sincerely,

David D. Wesselink
Chairman and Chief Executive Officer
Metris Companies Inc.